Requirements of Sound Legal Drafting and Their Impact on Legislative Reform

مقتضيات الصياغة القانونية السليمة وأثرها على الإصلاح التشريعي.



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Abstract:

For a legislative or regulatory text to be legally sound and consistent with the Constitution, international treaties, and the laws in force, it must be drafted with precision and clarity. This can only be achieved through a structured drafting process including bodies and authorities possessing expertise in legal writing and analytical skills, and committed to respecting the rules governing the preparation of legal texts by all ministerial sectors, public institutions, and public bodies.

Therefore, legislative drafting constitutes the fundamental mechanism through which the State's public policies and objectives are translated into coherent and harmonized legal rules that are easy to apply, and upon which individuals may rely both in actions brought against public authorities and in their legal relations with one another.

key words: Legal drafting, Legal rules, Legislation, Law reform.

الملخص

حتى يكون النص التشريعي أو التنظيمي سليما من الناحية القانونية، ومطابقا للدستور، والمعاهدات الدولية، والقوانين السارية المفعول، يجب أن يكون مصاغا بدقة ووضوح، ولا يأتي ذلك إلا بمرور عبر مراحل وأجهزة تتمتع بالخبرة في مجال المهارات الكتابية والتحليلية، التي تحرص على احترام القواعد المتعلقة بمسار إعداد النصوص القانونية من طرف جميع القطاعات الوزارية والمؤسسات والهيئات العمومية.

لذا، تشكل صياغة القوانين المكنة الأساسية التي يمكن من خلالها تحويل السياسات والأهداف العامة للدولة إلى قواعد قانونية متناسقة، ومنسجمة مع بعضها البعض يسهل تطبيقها، ويمكن للأفراد الاحتجاج بها في مواجهة السلطات العامة في الدولة، وفي مواجهة بعضهم البعض من جهة أخرى.

الكلمات المفتاحية: الصياغة القانونية، قواعد قانونية، التشريع، إصلاح القوانين.

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Introduction:

The quality and effectiveness of legal texts are closely related to the concept of legal certainty, which necessitates the provision of all components necessary to ensure the clarity of the legal text, ease of access thereto, and its stability, as well as to reduce the risks arising from its implementation. This is fulfilled through appropriate methods of preparing and drafting legal rules, both in form and content. Given that legal rules are of a general and public nature, they must be drafted in a manner suited to the citizens to whom they are addressed, so as to allow them to understand their provisions, comprehend the substance of the text, apply it in their daily lives, benefit from the rights it confers, and comply with the obligations it imposes.

Legal drafting is an art and a science in its own right. It is a science insofar as it is grounded in scientific methodology and legal reasoning that consider the present and future needs and circumstances of society, without disregarding previously acquired rights. It is an art insofar as it reflects the legislator's intent to reconcile conflicting interests and to place legal positions within their proper framework.

Thus, the drafting of legal texts is of paramount significance, as it constitutes the principal instrument for fulfilling the objectives of legislation by ensuring stability in legal positions, consistency in legal relations, and the safeguarding of individual rights. It allows individuals to organize and manage their affairs in accordance with the applicable legal framework. This necessarily requires that legislative texts be drafted with clarity and precision, be understandable to those subject to the law, and be easy to interpret and apply.

The quality of legal drafting has considerable social, economic, and political implications for the State, in addition to the crucial role that sound legal drafting plays in the process of legal reform. Accordingly, the issue arises as to the criteria governing the assurance of quality in the drafting of legal texts: **what are these controls, and what are the principals that regulate the quality of legal drafting and influence the construction of sound legislation?**

To address the problem statement regarding the nature of the requirements of sound legal drafting and the extent of their effect on the process of legislative reform, a descriptive and analytical methodology was adopted. It aims to describe the existing reality and analyze the prevailing legal situation. Therefore, the study is structured around a two-part framework divided into two main sections, as follows:

First Section: The Concept of Legal Drafting

Legal drafting does not merely mean formulating texts that become applicable simply upon their adoption; rather, it is a broad concept that includes the mechanisms of proper legal drafting and the manner in which these mechanisms contribute to translating legal rules into effect in the external sphere.

Therefore, to clarify the concept of legal drafting, it is necessary, first, to define the notion of "drafting" and, second, to determine its constituent components.

First: The Meaning of Legal Drafting.

At the beginning, the linguistic meaning of drafting will be addressed, followed by an explanation of the terminological meaning of legal drafting.

A) Legal Drafting (Linguistically)

Drafting denotes the preparation and construction of a thing; (to draft something) means to prepare and arrange it in a proper and orderly manner, while (to draft a word) refers to forming it from another word according to a specific pattern[1]. Accordingly, the expression (well-drafted) signifies good workmanship and precision; (the form of a command) refers to the structure upon which it is constructed; and (well-drafted speech) denotes speech that is clear, precise, and well-structured[2]

B) Legal Drafting (Terminologically)

Some legal scholars define legal drafting, in its terminological sense, as "a material process for translating the legal idea and embodying it in the form of a general and abstract rule through the use of linguistic tools. In practice, legal drafting consists in the careful selection of words and their logical arrangement so as to convey the intended rule to be incorporated into the legal rule; therefore, legal drafting combines both knowledge and skill[3]"

Others referred to it a "a tool for transforming the raw material from which the legal rule is formed into precise and well-defined rules capable of effective implementation, in a manner that fulfills the purpose inherent in their essence[4]".

Second: Components of Legal Drafting

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[1] Dictionary of the Arabic Language, Al-Mu‘jam Al-Wasit, Part One, General Authority for Amiri Press Affairs, second edition, Egypt, 1972, p. 528.

[2] Academy of the Arabic Language, Al-Mu‘jam Al-Wasit, pp. 528–529.

[3] Khaled bin Abdulrazzaq bin Saleh Al-Saffi, Guide to the Drafting of Systems and Regulations in the Kingdom of Saudi Arabia, foreword by Shaaban Abdel-Majid, Al-Falehin Printing and Publishing, first edition, Saudi Arabia, 2015, p. 21.

[4] Tawfiq Hassan Faraj, Introduction to Legal Sciences, Part One – General Theory of Law, University Publishing House, Syria, 1993, p. 164.

Legal drafting is based on numerous essential elements that reflect its core nature, namely:

A) Drafter.

The drafter is defined as "an expert in researching and processing information, whose role revolves around formulating the text in line with the requirements of the given communicative context. This allows the drafter to convey the message appropriately to its intended recipients, as expertise promotes efficiency and provides the qualifications essential for the proper processing of information in light of the target audience of the text[1]"

To ensure sound legal drafting, the selection of the drafter must be conducted with the utmost precision and care. Therefore, the drafter should possess the following qualifications:

- A high level of knowledge and understanding of law in general, encompassing familiarity with the foundations of legal science, its historical development, and its evolution, as well as comprehensive awareness of the multiple branches of law, whether public or private.
- Specialized competence in understanding the detailed aspects of the particular branch of law whose rules are to be drafted.
- Extensive practical legal expertise, allowing the drafter to appreciate the temporal and spatial circumstances surrounding the social reality for which the draft law is prepared, as well as the conditions of the persons who will be subject to and addressed by the provisions of the suggested legislation[2].
- Proficiency in legal language to accurately convey the intended meaning, since language involves the natural medium through which the legislator expresses the objectives aimed to be fulfilled.
- Well-developed skills and broad knowledge of the meanings and implications of legal terms, encompassing their general and specific scope and their absolute and qualified forms, in order to choose formulations consistent with the legislator’s intent. This includes choosing clear and

[1] Sonya Trudeau, Recommendations for Drafting in Clear and Plain Language: Between Readability and Intelligibility, Master’s thesis (M.A.), Faculty of Letters, Laval University, Quebec, 2003, p. 24.

[2] Khaled Jamal Ahmed Hassan, “The Nature of Legislative Drafting and the Elements of Its Quality,” Kuwaiti International Law Journal, Kuwait, Issue No. 02, Part One, May 2017, p. 144.

uncomplicated sentences, given their considerable impact on the clarity and effectiveness of legal language in legislative texts.

Based on the above, the selection of drafters should be made from among individuals who are closely involved in the procedures for preparing draft legal texts, namely:

- Legislative and legal affairs committees at the parliamentary level.
- Ministerial officials possessing experience in the substantive aspects of the draft law, as officials within the competent ministry typically oversee the drafting of detailed programs for the application of governmental policy within the relevant ministerial sector.
- Officials who have received progressive and specialized training in legislative drafting techniques.

B) The Addressee of the Legal Rule (Legal Actor).

The legal actor refers to the person to whom a right, privilege, or authority is granted, or upon whom an obligation or liability is imposed. Thus, any person who may or may not do something, who must or must not perform an act, or who is subject to a particular legal requirement, is considered a legal actor[1].

A distinction must be made between the subject in an ordinary sentence and the subject in a legal sentence. In an ordinary sentence, the subject is necessarily a natural person, as it is inconceivable to impose an obligation on a non-human entity, an inanimate object, or an animal. Conversely, in legal drafting, the subject need not be a natural person; it may be a public or private legal person upon whom the law imposes an act or necessitates abstention from an act[2].

In certain cases, the legal actor may not even be a person, as illustrated in the example: "This law shall be published in the Official Gazette of the People's Democratic Republic of Algeria".

It is well established in legal drafting that the legal actor is not an identified individual (e.g., "Mohamed" or "Omar"); rather, the legal rule addresses persons according to their legal status under the relevant legislative provision. Common formulations used to denote the legal actor include expressions such as "any person" or "whoever," which are broad in scope, including both natural and legal persons alike. In certain contexts, however, the drafter may employ a

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[1] Mahmoud Mohamed Ali Sabra, Principles of Legal Drafting in Arabic and English, Dar Al-Kutub Al-Qanuniyya, Egypt, 2002, p. 43.

[2] Laith Kamal Nasrawin, Journal of the Faculty of Law, Kuwait, Issue No. 2, Part One, May 2017, p. 396.

specific category or group, thereby limiting the application of the legal provision to those who meet a particular legal status, such as notaries, lawyers, physicians, and the like[1].

C) The Legal Act.

This is is the part of a sentence that expresses a right, privilege, authority, obligation, or liability conferred upon or imposed on the legal actor. It specifies what a person may or may not do, must or must not do, or whether they are subject to or exempt from a particular action, thereby defining the duties and permissions of the legal actor[2].

The legal act embodies the actions and tasks that the legal actor must perform or refrain from performing under the pain of violating the law. It represents the intended purpose of the legal rule, through which the legislator seeks to clarify the rights, duties, and obligations imposed on the parties to a legal relationship[3].

In legal drafting, the imperative form is most commonly employed to express the legal act. Examples encompass verbs such as shall, may, is vested with, and similar expressions. Moreover, legislative language frequently uses a specific set of verbs in legal documents, such as stipulates, applies, undertakes, and is bound. Declarative or descriptive language, by contrast, tends naturally to use the past tense, because legal language is inherently legislative: it enacts rules and establishes norms to regulate relationships within society. While the effect of ordinary statements ceases once they are read or heard, the effect of law remains in force as it was at the time of its issuance and continues until it is formally repealed[4].

Due to the legislative nature of legal language, the present tense is mainly employed to express legal acts, serving various purposes, such as giving a legislative command for instance: "The law hereby establishes…" or expressing a legal rule, legal provision, or policy that must be followed, such as: “Reference shall be made, with regard to the substantive conditions for the validity of a marriage contract, to the law of the nationality of each of the spouses” or “The

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[1] Laith Kamal Nasrawin, ibid., p. 396.

[2] Definition of the legal act by the American jurist George Kode, cited in: Mahmoud Mohamed Sabra, ibid., p. 62.

[3] Laith Kamal Nasrawin, ibid., p. 398.

[4] Mokhtar Douini, Standards Governing the Quality of the Legal Rule, doctoral dissertation submitted for the degree of Doctor of Sciences, specialization: Public Law, Faculty of Law and Political Sciences, Djillali Liabes University, Sidi Bel Abbès, 2014–2015, p. 146.

ordinary general assembly convenes once each year." It is also used to express rights and duties, for instance: "The tenant shall pay the rent to the landlord in the first week of each month" or "The project manager shall submit technical reports on the progress of the project to the board of directors[1]".

Notably, the past tense is rarely employed in legal language and only in special circumstances, such as when referring to completed events. Additionally, while a verb may appear in the past tense, its legal meaning generally applies to the present or future as long as its effect remains in force. The past tense is used merely for reporting or referencing completed acts, such as: "leased", "sold", "assigned " and the like[2].

D) Description of the Case.

This refers to the circumstances to which the legal act applies. When such circumstances are clearly expressed in the wording, the legislation becomes more precise and unambiguous. Rarely does a legal act apply to all situations; rather, it applies to a specific case or set of cases, either exhaustively defined or capable of being definitively determined. Therefore, defining and accurately describing the situation to avoid ambiguity is an essential part of the drafter's work. Furthermore, specifying the situation provides essential clarification of the conditions under which the legal rule applies or is suspended. For instance: "If the contract is civil in nature with respect to one of its parties, the provisions of the Civil Code shall apply thereto". In this case, the description of the case identifies the law applicable to the concluded contract[3].

Second Section: The Rules of Proper Legal Drafting and Their Impact on the Soundness of Legislation.

There are several standards specific to legal drafting that relate to the style of legal expression and the formulation of legislative provisions and their wording. Adherence to and observance of these standards ensure the quality of the enacted legislation and safeguard it against defects and errors that may affect it. The most important of these standards, as established in sound legislative practice, are as follows:

First: Logical Standards

When a drafter starts addressing a subject in new legislation, he must consider a set of logical factors and standards, including the following:

A) Proper Selection of the Drafter.

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[1] Mokhtar Douini, ibid., p. 146.

[2] Mokhtar Douini, ibid., p. 147.

[3] Laith Kamal Nasrawin, ibid., p. 400.

As previously mentioned, drafters must possess both legal and linguistic experience and acquire the technical skills necessary to translate policies into draft laws.

In addition to their legal knowledge, drafters must have a sound command of the Arabic language (and French in the case of Algerian legislation) to ensure that the legal text is linguistically accurate, coherent, and precise in both structure and meaning. They must also be fully aware of linguistic categories and their implications, allowing them to distinguish between general and specific terms, restricted and absolute terms, and to identify both the literal and intended meaning of the legal text[1].

Numerous words in Arabic may appear to have the same meaning but actually differ in nuance. For instance, the terms "al-fi'l" (action) and "al-amal" are often regarded as synonymous. However, "al-fi‘l" refers to all acts performed by a person, whether by hand, foot, or speech, whereas "al-amal"refers to acts performed by a person excluding spoken words. The drafter must also be well-versed in grammar and morphology to avoid ambiguities and ensure the intended meaning is accurately conveyed[2].

B) Considering the Circumstances Surrounding Members of Society.

When drafters prepare legal texts, they must consider the circumstances surrounding individuals in their social lives, such as geographical location and psychological state, as well as economic and political conditions. These factors should be considered when formulating a legal rule. Moreover, historical standards must be respected, reflecting the heritage left by previous generations in regulating social relations through customs, traditions, and practices. These standards represent a set of legal norms applied in society and developed over generations. There are also rational standards, including ideas and truths derived through human reasoning, which are refined to align with the objectives of the law. Drafters demonstrate and embody these ideas in written legal rules capable of conforming to logical and scientific reasoning[3].

Second: Standards for Proper Legal Expression

Legal drafting, as both a science and an art, is governed by a set of standards. These include the careful selection of the drafter, attention to sentence length, structure, and complexity, and the choice of words or terminology. Furthermore, the drafter must ensure that sentences are not overloaded, that they

[1] Khaled Jamal Ahmed Hassan, ibid., pp. 145–146.

[2] Ismail Ben Haffaf, ibid., p. 113.

[3] Laith Kamal Nasrawin, ibid., p. 422.

are easy to read, and that punctuation marks are employed appropriately to reinforce the intended meaning[1].

A) Choosing the Appropriate Sentence.

Each sentence should convey a single idea, and a sentence should not include more than one idea. Short and medium-length sentences are preferred. For legal drafters, the optimal average sentence length ranges from twenty (20) to twenty-five (25) words. Varying sentence length is essential to avoid monotony, which can complicate understanding and slow comprehension. The longest sentences should not exceed thirty-five (35) words[2].

Drafters should also vary sentence length by starting with short sentences and then presenting longer ones, without creating a repetitive or monotonous pattern. They should utilize enumeration to clarify the components of longer sentences, breaking them into separate, orderly lists employing letters (a, b, c, …) or numbers (1, 2, 3, …). Nevertheless, enumeration should not be overused; it should serve only to enhance sentence clarity, distinguish components, and link elements that are similar in structure and function. Enumeration should not be employed to connect a set of legal provisions that could instead be expressed as separate sentences[3].

The legislator uses parallelism, balance, and repetitive structural wording, meaning successive constructions that are, at the same time, balanced. Each construction employs approximately the same number of words and follows the same pattern[4].

If it is necessary for a sentence to start with a component other than the verb, words or clauses must be used to prepare the ground for the verb and its subject to follow. In most cases, the subject is preceded only by adverbial phrases demonstrating time, reason, or conditions. The reader interprets these phrases as providing context, which is easily retained until the verb appears. Thus, the verb should be placed as close as possible to the subject, as they form a single unit. For drafting to be clear and authoritative, the drafter may also use

[1] Mokhtar Douini, ibid., p. 149.

[2] Mahmoud Mohamed Ali Sabra, ibid., p. 275.

[3] Mokhtar Douini, ibid., p. 150.

[4] For clarification, the following example is given: infringement of another's trademark, trade name, or patent. In this case, the enumerative style is not used; rather, the method of parallelism, balance, and repetitive structural expressions is adopted, which also helps to clearly distinguish the elements of the sentence. See: Mokhtar Douini, ibid., p. 150.

fronting and postponement techniques, such as placing the object before the subject, for example: "It is considered a commercial act…[1]".

Among the fundamental principals of legal drafting is the requirement that the drafter use the active voice and avoid the passive voice, as the use of the former ensures the clear identification of the legal actor. When a sentence in a legal text expresses a right, a privilege, an obligation, or a legal act, the active voice compels the drafter to specify the person to whom that right is granted or upon whom that obligation is imposed[2].

Furthermore, it is necessary to employ affirmative rather than negative constructions, since affirmative sentences are understood more quickly and easily than negative ones. In the latter, the reader must first comprehend the affirmative meaning and then negate it. Accordingly, to fulfill a clear legal text, it should be drafted using simple sentences[3].

B) Selection of Words and Terms.

Legal language frequently employs words and expressions that are uncommon and can be replaced with simpler alternatives to enhance clarity without changing meaning. Since the purpose of legal terms is to convey a specific meaning, there must be no ambiguity about the intended sense.

When selecting words in legal drafting, the drafter should employ them according to their ordinary and natural meaning to ensure that the reader comprehends the precise sense intended by the legislator. In some cases, the ordinary meaning may be difficult to determine; it may correspond to the common use at the time of drafting, or to a specific meaning agreed upon by the parties[4].

Sometimes, the legislator may employ technical terms. In such cases, marginal notes should be utilized to explain the meaning of the technical term so that the reader, whether specialist or layperson, can understand it. Additionally, legal language should not be accessible only to legal scholars. Although it is drafted and interpreted by specialists, it addresses ordinary people and must be understandable without an intermediary[5].

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[1] Mokhtar Douini, ibid., p. 150.

[2] The active voice in legal drafting is achieved when the person who performs the legal act occupies the position of the subject in the sentence, and the person receiving the legal act occupies the position of the object.

[3] Mokhtar Douini, ibid., p. 151.

[4] Mohamed Mahmoud Ali Sabra, ibid., p. 304.

[5] Mohamed Mahmoud Ali Sabra, ibid., p. 305.

The drafter should also avoid verbosity[1], limiting the text to what is necessary and focusing on fundamental principles while avoiding excessive detail. This prevents overloading the legal text. The intended meaning should be expressed in the fewest possible words, as excessive length can give rise to interpretations that diverge from the legislator's purpose[2].

C) Use of Punctuation Marks.

In legal drafting, punctuation marks play a significant role in ensuring clarity and precision. The most commonly used punctuation marks are the comma (,), semicolon (;), colon (:), and slash (/). The comma is utilized to clarify restrictive phrases within a legal sentence and to separate them from the main components of the sentence.

The semicolon is employed to link closely related clauses that cannot be separated into independent sentences, and it also serves to separate items in a list when each item includes internal subdivisions marked by commas. The colon is utilized to present an explanation, clarification, or expansion of a statement that proceeds it. Ultimately, the slash is used to demonstrate alternatives or inclusivity, conveying meanings such as "either/or" or "both," as seen in expressions like and/or, in gender-inclusive pronouns (he/she), or in contractual terminology (seller/buyer, insurer/insured)[3].

First: Results

- Legal drafting is the means by which legislation is conveyed to the addressee in a clear and precise form, leaving no ambiguity. To fulfill this, legal drafting must adhere to a set of rules, standards, and guidelines.
- Legal drafting is both a science and an art, comprising linguistic standards that shape legal rules in a manner consistent with the legislative policy adopted by the state.
- Legal drafting is a direct means by which legal texts are produced and made publicly accessible, allowing their practical application by those subject to them.
- Legal drafting serves as a tool for legal stability. Since law is the primary instrument for organizing relations among individuals in society, this organization must ensure stability in legal positions. Legal stability is fulfilled through the formulation of clear and precise legal rules.

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[1] In the science of semantics, verbosity (redundancy) (اطناب) means that wording exceeds the meaning in order to achieve a specific purpose; it is the opposite of brevity.

[2] Ismail Ben Haffaf, ibid., p. 114.

[3] Mokhtar Douini, ibid., p. 158.

Second: Recommandations

- Establishing an independent national body to monitor legislative quality in Algeria, composed of experts specialized in legal drafting, tasked with reviewing draft laws, determining deficiencies, and offering recommendations.
- Teaching legal drafting and its underlying principales in institutes and universities (law faculties), given their significance in creating a specialized cadre of drafters who can be further developed in the future.
- Legislators should strictly adhere to legal drafting standards, ensuring precise selection of words and sentences when formulating legal rules,
- and maintaining correct linguistic distinctions.

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